No. 600.

IN THE

United States Circuit Court of Appeals

FOR THE

NINTH CIRCUIT.

LOUIS SALLA, et al.,

PLAINTIFFS IN ERROR,

VS.

THE UNITED STATES OF AMERICA,

DEFENDANT IN ERROR.

Supplemental Brief of Plaintiffs in Error.

Error to the District Court of the United States for the District of Idaho.

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THE UNITED STATES OF AMERICA,
Defendant in Error.

SUPPLEMENTAL BRIEF OF PLAINTIFFS IN ERROR.

Plaintiffs in error, by leave of Court, file their supplemental brief, and in addition to the errors assigned in the original brief, specify the following errors, the first of which is set forth in the transcript as Assignment of Error No. III, at page 357, and the second as Assignment of Error No. LXXX, at page 377.

III.

The Court erred in overruling the demurrer to the indictment. (Tr., p. 9.)

LXXX.

The Court erred in overruling defendants' motion for an arrest of judgment. (Tr., p. 49.)

These two assignments of error may be treated together.

The demurrer was general and special. There was a special demurrer to the first count of the indictment, to wit: That the facts stated in said first count do not constitute a public offense. (Tr., p. 11.)

The fifth ground of the motion for arrest of judgment is that the facts stated in said first count do not constitute a public offense. (Tr., p. 51.)

The plaintiffs in error respectfully contend that the facts stated in the first count of the indictment do not constitute an offense against the United States, and that the demurrer should have been sustained, but, having been overruled, the motion for arrest of judgment should have been allowed for the same reason.

The charge made in the indictment is that the defendants conspired "to unlawfully, willfully, maliciously, and knowingly delay, prevent, obstruct, and retard the movement and passage of a certain railway car and train over the lines and tracks of the Northern Pacific Railway Company by the said Northern Pacific Railway Company." * * * * * *

The object and scope of the conspiracy was, according to this allegation, to delay, prevent, obstruct and retard the movement and passage of a *certain railway car and train* over the lines of the Northern Pacific Railway Company.

Such a conspiracy is not an offense against the United States, and therefore the Court had no jurisdiction.

The Courts of the United States have no jurisdiction

over offenses not made punishable by the Constitution, laws or treaties of the United States.

Pettibone *vs.* United States, 148 U. S., 197, 203.

It is not alleged that the conspiracy was formed or that it was the object of said conspiracy to willfully and knowingly obstruct or retard the movement or passage of the mails of the United States, or of any carrier or carriage containing the mails of the United States.

Following the statement above set forth of the object of the conspiracy, there is a recital in the following language: "The said Northern Pacific Railway Company then and there being engaged in the business of a common carrier of the mails of the United States, which said railway car and train were then and there carrying and transporting the mails of the United States." * * *

The recital of such a material fact is insufficient. The general rule in reference to an indictment is that all the material facts and circumstances embraced in the definition of the offense must be stated, and that, if any essential element of the crime is omitted, such omission cannot be supplied by intendment or implication. The charge must be made directly and not inferentially, or by way of recital.

Pettibone *vs.* United States, 148 U. S., 197, 202.

In United States *vs.* Britton, 108 U. S., 199, it was held, in an indictment for conspiracy under Section 5440 of the Revised Statutes, that the conspiracy must be sufficiently charged, and cannot be aided by averments of acts done by

one or more of the conspirators in furtherence of the object of the conspiracy.

Pettibone *vs.* United States, 148 U. S., 197, 202-3.

It is neither alleged nor recited in said first count of the indictment that the defendants, or any of them, knew that the Northern Pacific Railway Company was, at the time mentioned, or at any time, engaged in the business of a common carrier of the mails of the United States, or that said railway car and train were then and there carrying and transporting the mails of the United States.

To constitute an offense under Section 3995, R. S. U. S., the parties must have obstructed and retarded the passage of the mails or the carrier thereof, *willfully and knowingly*.

In the absence of such an allegation the indictment is insufficient.

Pettibone *vs.* United States, 148 U. S., 197;
Johnson *vs.* State, 26 Texas, 117;
State *vs.* Carpenter et al., 54 Ver., 551.

Respectfully submitted.

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